

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: December 16, 2005

DEPT. 71 REPORTER:
CSR#:

HON. RONALD S. PRAGER,
ADDRESS:

JUDGE PRESIDING

REPORTER'S

P. O. Box 128
San Diego, CA 92112-4104

CLERK: K. Sandoval

BAILIFF:

Judicial Council
Coordination Proceedings
No. JCCP 4041

Coordination Proceeding
Title [Rule 1550(b)]
TOBACCO CASE

PEOPLE VS. US SMOKELESS TOBACCO
DEMURRER TO AND MOTION TO STRIKE DEFENDANT'S AMENDED ANSWER

The Court rules on the Demurrer and Motion to Strike of Plaintiff People of the State of California ("Plaintiff") against the Amended Answer filed by Defendant U.S. Smokeless Tobacco Company ("Defendant" or "USSTC") as follows:

The Court grants Plaintiff's Request for Judicial Notice of the pertinent Consent Decree and Smokeless Tobacco Master Settlement Agreement ("STMSA") under Evidence Code section 452(d).

The Court grants Plaintiff's Request for Judicial Notice of Section XV of the cigarette Master Settlement Agreement (*People of the State of California, et al. v. Phillip Morris, Inc. et al.*, JCCP No. 4041) under Evidence Code section 452 (d).

The Court grants Plaintiff's Request for Judicial Notice of the Notice of Entry of Order (*People v. R.J. Reynolds Tobacco Co.*, GIC764118 in JCCP No. 4041) under Evidence Code section 452(d).

The Court sustains without leave to amend Plaintiff's demurrer to Defendant's First Affirmative Defense (Failure to State a Claim). This is not a valid affirmative defense in that it raises no new facts establishing a defense independent of the Complaint's allegations. (*Walsh v. West Valley Mission Community College District*

(1998) 66 Cal.App.4th 1532, 1545-46). Moreover, if Defendant believed Plaintiff failed to allege sufficient facts to support its claims, it should have filed a demurrer and/or motion to strike.

The Court sustains without leave to amend Plaintiff's demurrer to Defendant's Second Affirmative Defense (Material Compliance). The language of the affirmative defense shows it does not raise "new matter," but is simply a challenge to Plaintiff's allegations of breach. Thus, it is not a valid affirmative defense as it raises no new matters outside the context of the Complaint. (*Walsh, supra*, 66 Cal.App.4th at 1545-46).

The Court sustains without leave to amend Plaintiff's demurrer to Defendant's Third Affirmative Defense (Defendant's Conduct Permitted by STMSA and Consent Decree). The fact the alleged conduct is expressly permitted by the STMSA and Consent Decree is not a valid affirmative defense because it simply contradicts the allegations of the Complaint that the STMSA and Consent Decree prohibit Defendant's alleged conduct. Thus, it is not a valid affirmative defense as it raises no new matters outside the context of the Complaint. (*Walsh, supra*, 66 Cal.App.4th at 1545-46).

The Court overrules Plaintiff's demurrer to Defendant's Fourth Affirmative Defense (Plaintiff's Conduct Bars a Claim of Defendant's Breach). Defendant argues the defense is based on sections of the STMSA (particularly sections VII(a), (a)(4), (c)(6), (f), and (m)), that create an obligation on the part of Plaintiff to cooperate and coordinate and facilitate implementation of the STMSA. This is a valid affirmative defense in that the matters giving rise to this defense are not raised by the Complaint.

The Court overrules Plaintiff's demurrer to Defendant's Fifth Affirmative Defense (USSTC Addressed the Issues, No Prior Enforcement Action Filed, Good Faith). Defendant argues the defense is based on sections VII (c)(5) and (6) of the STMSA, and not on common law defenses, which would not be valid affirmative defenses in a breach of contract action. This is a valid affirmative defense in that the matters giving rise to this defense are not raised by the Complaint.

The Court sustains with leave to amend Plaintiff's demurrer to Defendant's Sixth Affirmative Defense (Res Judicata, Collateral Estoppel, Mootness). As pled, this defense does not meet the requirement of pleading ultimate facts. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384).

The Court sustains with leave to amend Plaintiff's demurrer to Defendant's Seventh Affirmative Defense (Plaintiff's Construction of STMSA and Consent Decree Impermissibly Vague). As pled, this defense does not meet the requirement of pleading ultimate facts. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384).

The Court overrules Plaintiff's demurrer to Defendant's Eleventh Affirmative Defense (First Amendment). The STMSA provides Defendant waives all claims that the STMSA violates the state or federal Constitutions. (Plaintiff's Exhibit 1 (STMSA), §XIII, at 52). However, the STMSA also states:

Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations, or obligations expressly agreed to in this Agreement or the Consent Decree. (*Id.*).

Thus, Defendant waived Constitutional defenses only so long as the Court's order is consistent with the restrictions, limitations or obligations expressly agreed to in the STMSA. Defendant expressly pled the affirmative defense only "[t]o the extent that plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA." (Ans., p. 15). Thus, the waiver in section XIII of the STMSA does not bar Defendant's affirmative defense here.

The Court overrules Plaintiff's demurrer to Defendant's Twelfth Affirmative Defense (Fifth Amendment). As discussed above, Defendant waived Constitutional defenses only so long as the Court's order is consistent with the restrictions, limitations or obligations expressly agreed to in the STMSA. (Plaintiff's Exhibit 1 (STMSA), §XIII, at 52). Defendant expressly pled the affirmative defense only "[t]o the extent that plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA." (Ans., p. 15). Thus, the waiver in section XIII of the STMSA does not bar Defendant's affirmative defense here.

The Court overrules Plaintiff's demurrer to Defendant's Thirteenth Affirmative Defense (Commerce Clause). As discussed above, Defendant waived Constitutional defenses only so long as the Court's order is consistent with the restrictions, limitations or obligations expressly agreed to in the STMSA. (Plaintiff's Exhibit 1 (STMSA), §XIII, at 52). Defendant expressly pled the affirmative defense only "[t]o the extent that plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA." (Ans., p. 15). Thus, the waiver in section XIII of the STMSA does not bar Defendant's affirmative defense here.

The Court overrules Plaintiff's demurrer to Defendant's Fourteenth Affirmative Defense (Federal Preemption). As discussed above, Defendant waived Constitutional defenses only so long as the Court's order is consistent with the restrictions, limitations or obligations expressly agreed to in the STMSA. (Plaintiff's Exhibit 1 (STMSA), §XIII, at 52). Defendant expressly pled the affirmative defense only "[t]o the extent that

plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA.” (Ans., p. 15). Thus, the waiver in section XIII of the STMSA does not bar Defendant’s affirmative defense here.

Plaintiff’s Motion to Strike Defendant’s First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, Twelfth, Thirteenth, and Fourteenth Affirmative Defenses is moot based on the Court’s ruling on the demurrer to these Affirmative Defenses.

Plaintiff’s Demurrer to Defendant’s Response to Paragraphs 66-71 of the Complaint is overruled. A demurrer is not the proper vehicle to challenge certain paragraphs of an answer that do not make up an entire answer or affirmative defense. (See Cal. Civ. Pro. §430.50(b)).

Plaintiff’s Motion to Strike Defendant’s Response to Paragraphs 66-71 of the Complaint is denied. Plaintiff bases its motion to strike on the argument the response is false. Falsity must appear from the face of the pleadings or from matters judicially noticed. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21). Since the response merely denies the allegations contained in the Complaint at paragraphs 66-71, there is no falsity on the face of the answer.

FACTUAL AND PROCEDURAL BACKGROUND:

On August 10, 2005, the People filed a First Amended Complaint against Defendant U.S. Smokeless Tobacco Company (“USSTC”), seeking enforcement of the Smokeless Tobacco Master Settlement Agreement (“STMSA”) and Consent Decree, entered into by USSTC. The STMSA limits the number of brand name sponsorships to one per year and bans sponsorship of events that allow contestants younger than age 18. The STMSA and Consent Decree broadly ban outdoor advertising of tobacco brand name merchandise bearing a tobacco name, and payments to others to show or use a brand name on television or in a live performance.

The People now allege USSTC is in violation of these restrictions in that USSC, through its “Skoal” brand of oral snuff tobacco, engages in brand name sponsorship of events that allow contestants younger than 18, and has multiple brand name sponsorships that violate the outdoor advertising, merchandising, and product placement restrictions.

USSTC filed an Amended Answer to the People’s Complaint, asserting a number of affirmative defenses to the allegations of the Complaint. On November 4, 2005, the People filed the instant Demurrer to USSTC’s Amended Answer on the following grounds:

- 1) The First Affirmative Defense, which alleges the Complaint fails to state a claim upon which relief can be granted, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 2) The Second Affirmative Defense, which claims USSTC has materially complied with the STMSA and Consent Decree, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 3) The Third Affirmative Defense, which asserts the alleged conducts is expressly permitted by the STMSA and Consent Decree, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 4) The Fourth Affirmative Defense, which asserts the People have breached the STMSA and Consent Decree, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 5) The Fifth Affirmative Defense, which asserts USSTC has acted in good faith, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 6) The Sixth Affirmative Defense, which asserts the doctrines of res judicata, collateral estoppel, and mootness, does not state facts sufficient to constitute a defense (CCP § 430.20(a));
- 7) The Seventh Affirmative Defense, which contends the People's claims construe the STMSA and Consent Decree in a manner that would render them impermissibly vague, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a), 431.30(b)(2));
- 8) The Eleventh Affirmative Defense, based on the protections for free speech in the US and California Constitutions, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a));
- 9) The Twelfth Affirmative Defense, based on the Fifth Amendment to the US Constitution, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a));
- 10) The Thirteenth Affirmative Defense, based on the Commerce Clause of the US Constitution, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a));
- 11) The Fourteenth Affirmative Defense, based on federal preemption, does not state facts sufficient to constitute a defense (CCP §§ 430.20(a)); and
- 12) USSTC's response to paragraphs 66-71 of the Complaint is uncertain (CCP §§ 430.20(b));

SUMMARY OF DEMURRER AND MOTION TO STRIKE:**Request for Judicial Notice:**

Pursuant to CCP §§ 452(c), (d), (h), and 453, Plaintiff asks the Court to take judicial notice of the following:

1. Consent Decree and Final Judgment with respect to STMSA in *People v. Phillip Morris*, JCCP 4041 (Exhibit 1);
2. Section XV, "Voluntary Act of the Parties," of the cigarette MSA in *People v. Phillip Morris*, JCCP No. 4041 (Exhibit 2); and
3. Notice of Entry of Order, Exhibit A: Order on the People's Demurrer and Motion to Strike Defendant's Answer, in *People v. RJ Reynolds*, JCCP 4041 (Exhibit 3).

First Affirmative Defense (Failure to State a Claim):

In its First Affirmative Defense, USSTC alleges the Complaint "fails to state a claim upon which relief can be granted." (Ans., p.13). The People argue this is not a valid affirmative defense because it does not raise "new matter constituting a defense." (CCP §431.30(b)(2)).

"New matter" refers to something relied upon by a defendant that is not put in issue by the complaint. (*Walsh v. West Valley Mission Community College District* (1998) 66 Cal.App.4th 1532, 1546). An affirmative defense involves allegations of new facts that do not contradict the allegations of the complaint, but "tend to establish a defense independently of them." (*ibid.*). The People argue the First Affirmative Defense is invalid because it raises no new facts establishing a defense independent of the Complaint's allegations.

Second Affirmative Defense (Material Compliance):

In its Second Affirmative Defense, USSTC alleges the People's claims are barred because "USSTC has materially complied with its obligations under the STMSA and Consent Decree." (Ans., p. 13). The People argue this is not a valid affirmative defense because it does not state new matter constituting a defense. (CCP §431.30(b)(2)).

The People argue the defense amounts to an admission of partial noncompliance, which is not new matter because it does nothing to "destroy the right of action" the People allege. (*Walsh, supra*, 66 Cal.App.4th at 1546).

Third Affirmative Defense (STMSA and Consent Decree Expressly Permit USSTC's Conduct):

In its Third Affirmative Defense, USSTC alleges the People's claims are barred because "the alleged conduct that is the subject matter of the Complaint is expressly permitted by the STMSA and Consent Decree." (Ans., p. 13). The People argue this is not a valid affirmative defense because it merely contradicts the allegations of the Complaint that USSTC's conduct is not permitted by STMSA and Consent Decree. Thus, since the defense does not raise any new matter, it is invalid. (*Walsh, supra*).

Fourth Affirmative Defense (Plaintiff's Alleged Conduct Bars a Claim of USSTC's Breach):

In its Fourth Affirmative Defense, USSTC alleges the People's claims are barred because the People:

breached the STMSA and Consent Decree by failing to (a) coordinate, facilitate, and implement the STMSA and cooperate with USSTC in this respect; (b) attempt to resolve the alleged violations of the STMSA by discussion among appropriate designees whenever possible; (c) support the integrity of the terms of the STMSA; and (d) act in good faith and deal fairly with USSTC. (Ans., p. 14).

The People argue they have been trying to work with USSTC since early 2004 to resolve the issues in this case, and that USSTC acknowledges the People's efforts elsewhere in its Answer. (Ans., p. 7, ¶40; p. 12, ¶74).

Moreover, USSTC's allegations are not a defense to USSTC's violation of the STMSA and Consent Decree. The STMSA and Consent Decree do not make USSTC's compliance with the injunctions contingent on the People's conduct. USSTC is not granted leave to amend because there are no circumstances under which the conduct of the People could cure USSTC's breach of the STMSA and Consent Decree.

Fifth Affirmative Defense (USSTC Addressed the Issues, First Case People Filed Against USSTC, USSTC Holds its Belief in Good Faith):

USSTC's Fifth Affirmative Defense alleges the People's claims are barred because:

(a) USSTC has taken appropriate and reasonable steps to address the issues raised by plaintiff in connection with this matter; (b) no enforcement action under the STMSA or Consent Decree has been previously filed by plaintiff or any other Settling State against USSTC; and (c) USSTC's beliefs as to the meaning of the relevant terms of the STMSA and Consent Decree are legitimate and held in good faith. (Ans., p. 14).

As to (a), the People argue the defense is invalid because whether USSTC has adequately addressed issues raised in the Complaint is a question presented by the Complaint, and not new matter. As to (b), the People argue the fact that no previous enforcement action has been filed against USSTC cannot be a defense to an action.

As to (c), the People argue whether USSTC's beliefs as to the meaning of the terms of the STMSA and Consent Decree raised in the Complaint are legitimate or held in good faith is a question the Complaint presents, and is not new matter. Moreover, whether the Court finds a good-faith dispute may be relevant to the type of relief available, but it is not a defense to a claim that USSTC violated the STMSA and Consent Decree. If the Court finds a good faith dispute exists, it may in its discretion enter relief in the form of a Declaratory Order rather than an Enforcement Order. (STMSA, §VII(c)(5), p. 42).

Sixth Affirmative Defense (Res Judicata, Collateral Estoppel, Mootness):

The Sixth Affirmative Defense alleges the People's claims are barred by the doctrines of res judicata, collateral estoppel, and mootness. (Ans, p. 14). The People argue this defense does not meet the requirement of stating ultimate facts.

In addition, this is not a valid affirmative defense because the STMSA states, "[t]his release and covenant shall not operate to interfere with a Settling State's ability to enforce as against any Participating Manufacturer the provisions of this Agreement, or with the Court's ability to . . . maintain continuing jurisdiction to enforce such Consent Decree pursuant to the terms thereof." (STMSA §X(e), p. 48).

Seventh Affirmative Defense (Plaintiff's Construction of STMSA and Consent Decree Impermissibly Vague):

USSTC's Seventh Affirmative Defense alleges the People's claims are barred because they "construe the STMSA and Consent Decree in a manner that would render them impermissibly vague." (Ans., p. 14). The People argue this is not a valid affirmative defense because it merely challenges the People's interpretation of the STMSA and is tantamount to a denial of the People's allegations.

Eleventh Affirmative Defense (First Amendment):

USSTC's Eleventh Affirmative Defense alleges the People's claims are barred by the First Amendment to the US Constitution and provisions of the California Constitution that protect free speech and/or activities. (Ans., pp. 14-15). The People argue this is not a valid defense because in the STMSA, USSTC voluntarily and expressly waived all constitutional defenses. (STMSA, §XII, p. 52).

The Court of Appeal has affirmed rulings that the identical cigarette MSA waiver bars constitutional defenses to enforcement actions. (*People v. RJ Reynolds Tobacco* (2004) 116 Cal.App.4th 1253, 1267; *People v. RJ Reynolds Tobacco* (2003) 107 Cal.App.4th 516, 532-533).

Twelfth Affirmative Defense (Fifth Amendment):

USSTC's Twelfth Affirmative Defense asserts the People's claims are barred by the Fifth Amendment to the US Constitution. (Ans., p. 15). The People allege this is not a valid defense because in the STMSA, USSTC voluntarily waived all constitutional defenses. See above.

Thirteenth Affirmative Defense (Commerce Clause):

USSTC's Thirteenth Affirmative Defense asserts the People's claims are barred by the commerce clause of the US Constitution. (Ans., p. 15). The People allege this is not a valid defense because in the STMSA, USSTC voluntarily waived all constitutional defenses. See above.

Fourteenth Affirmative Defense (Federal Preemption):

USSTC's Fourteenth Affirmative Defense asserts the People's claims are preempted by the Comprehensive Smokeless Tobacco Health & Education Act of 1986 (CSTHEA). (Ans., p. 15). The People allege this is not a valid defense because in the STMAS, USSTC voluntarily waived any reliance on a constitutional defense such as preemption under the Supremacy Clause. See above.

Moreover, the preemption defense is invalid on its own terms. The CSTHEA preempts only "State or local statute or regulation" requiring statements related to "the use of smokeless tobacco products and health" to be "included on any package or in any advertisement." (15 U.S.C. §4406). Neither the STMSA nor the Consent Decree is a statute or regulation. Further, the claims at issue here are not about health warnings. In addition, the Supreme Court, in examining the question of preemption under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 et seq., concluded the act "was best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." (*Cipollone v. Ligett Group, Inc.* (1992) 505 U.S. 504, 518-19).

USSTC's Response to Complaint Paragraphs 66-71:

The People argue USSTC's Response mischaracterizes and then denies the People's allegations, thus giving no clear response to the allegations of the Complaint. Section 431.30 requires USSTC to admit or deny each paragraph or part of the Complaint.

SUMMARY OF OPPOSITION:**First Affirmative Defense:**

USSTC argues California practice guides and secondary authorities support the position that failure to state a cause of action can be properly pled as an affirmative defense.

Second Affirmative Defense:

USSTC argues the defense of material compliance with the STMSA is a valid affirmative defense because the Complaint does not address the issue of if USSTC is found to have violated the STMSA, it may, nonetheless, be found to have materially complied with it.

Third Affirmative Defense:

USSTC states in order to avoid being foreclosed from raising the defense later, it affirmatively pled that the STMSA and Consent Decree expressly permit USSTC's conduct.

Fourth Affirmative Defense:

USSTC argues its affirmative defense that Plaintiff has breached the STMSA and Consent Decree is valid because Plaintiff's breach can bar its claims against USSTC under the doctrine of failure of consideration. In bilateral contracts for an agreed exchange, where one party has materially failed to perform its promise, the other party's duty to perform is discharged. (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §813, p. 906). USSTC argues it undertook obligations *under the STMSA* in exchange for obligations assumed by Plaintiff.

Fifth Affirmative Defense:

USSTC argues this defense is based on the express terms of section VII(c)(5) and (6) of the STMSA, which provide that the Court can issue a Declaratory Order if a good faith dispute exists as to the meaning of the terms (VII (c)(5)), and that before seeking an enforcement order, the plaintiff must give good faith consideration to whether the defendant has attempted to cure the violation (VII(c)(6)). This is an appropriate affirmative defense because it limits the relief available to a plaintiff. (See, e.g., 4 Schwing, California Affirmative Defenses (West 2005) §44:1). In addition, the matters giving rise to this defense are not raised by the Complaint.

Sixth Affirmative Defense:

USSTC argues the doctrines of res judicata, collateral estoppel, and mootness are valid affirmative defenses. (See 1 Schwing, California Affirmative Defenses (West 2005) §§ 14:54, 15:12, 22:2).

Seventh Affirmative Defense:

USSTC argues even if the allegations of the Complaint are accepted as true, Plaintiff's interpretation of the STMSA and Consent Decree would render those documents impermissible vague under California law. (See *Brunton v. Superior Court* (1942) 20 Cal.2d 202, 205). Thus, it is a valid affirmative defense because notwithstanding the truth of the allegations of the Complaint, no cause of action exists.

Eleventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses:

USSTC argues these defenses properly assert USSTC's Constitutional rights. Section XIII of the STMSA states USSTC waives all claims that the STMSA violates the state or federal constitutions. The STMSA qualifies this waiver by stating:

Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations, or obligations expressly agreed to in this Agreement or the Consent Decree. (STMSA, §XIII).

Thus, the parties waived rights their Constitutional rights only so long as the Court's order is consistent with the STMSA and Consent Decree. (See *California v. R.J. Reynolds Tobacco Co.* (Super. Ct. San Diego County, June 6, 2002, No. GIC764118) 2002 WL 1292994, at *9, aff'd. in part, rev'd. in part, (2004) 116 Cal.App.4th 1253). USSTC pled each affirmative defense only "[t]o the extent that plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA." (Answer, p.15). USSTC argues Plaintiff is seeking to impose obligations on USSTC that go beyond the terms of the STMSA, and that USSTC did not waive its constitutional rights as to that conduct.

USSTC's Response to Paragraphs 66-71:

Plaintiff alleges USSTC's responses are false and uncertain. USSTC argues its responses are not false, and that the responses expressly state USSTC's good faith interpretation of the allegations. USSTC also argues its responses are not uncertain because they clearly deny the allegations as reasonably interpreted by USSTC.

USSTC also argues a motion to strike and demurrer are the wrong procedural vehicles to challenge USSTC's denials. Good faith denials contained in a verified answer may not be stricken on the ground they are false. (See 5 Witkin, Cal. Procedure 4th ed. 1997) Pleadings, §985; *Greenbaum v. Turrill* (1881) 57 Cal.285, 287). Moreover, a demurrer can be taken to an entire answer or particular defense, but not to particular responses within an answer. (See *Locke v. Peters* (1884) 65 Cal.161, 162).

SUMMARY OF REPLY:

Request for Judicial Notice:

Plaintiff's Request for Judicial Notice should be granted. The Consent Decree and STMSA (Exhibit 1), Section XV of the cigarette MSA (Exhibit 2), and Notice of Entry of Order (Exhibit 3), are all contained in the Court records. Thus, the Court can take judicial notice of these matters under Evidence Code section 452 (d).

First Affirmative Defense (Failure to State a Claim):

This is not a valid affirmative defense in that it does not raise "new matter." (*Walsh v. West Valley Mission Community College District* (1998) 66 Cal.App.4th 1532, 1545-46). An affirmative defense involves allegations of new facts that do not contradict the allegations of the complaint, but "tend to establish a defense independently of them." (*Ibid.*). The First Affirmative Defense is invalid because it raises no new facts establishing a defense independent of the Complaint's allegations. This defense is not waived even if not asserted by the answer, and, thus, it is not necessary to affirmatively assert it as a defense. (CCP §430.80(a)). Moreover, if USSTC believed the People failed to allege sufficient facts to support their claims, it should have filed a Demurrer and/or Motion to Strike.

Thus, the demurrer to the First Affirmative Defense should be sustained, without leave to amend. Based on this ruling the People's Motion to Strike the First Affirmative Defense is moot.

Second Affirmative Defense (Material Compliance):

Again, the fact USSTC materially complied with its obligations under the STMSA and Consent Decree is not a valid affirmative defense because it does not raise "new matter." (*Walsh, supra*). The defense is simply a challenge to the allegations of the Complaint that USSTC breached its obligations under the STMSA and Consent Decree. The Second Affirmative Defense is invalid because it raises no new facts establishing a defense independent of the Complaint's allegations. This defense is included in the

general denial to the Complaint.

Thus, the People's demurrer to the Second Affirmative Defense should be sustained, without leave to amend. Based on this ruling the People's Motion to Strike the Second Affirmative Defense is moot.

Third Affirmative Defense (STMSA and Consent Decree Expressly Permit USSTC's Conduct):

Again, the fact the alleged conduct is expressly permitted by the STMSA and Consent Decree is not a valid affirmative defense because it simply contradicts the allegations of the Complaint that the STMSA and Consent Decree prohibit USSTC's conduct. The Third Affirmative Defense is invalid because it raises no new facts establishing a defense independent of the allegations of the Complaint. (*Walsh, supra*). This defense is included in the general denial to the Complaint.

Thus, the People's demurrer to the Third Affirmative Defense should be sustained, without leave to amend. Based on this ruling the People's Motion to Strike the Third Affirmative Defense is moot.

Fourth Affirmative Defense (Plaintiff's Conduct Bars a Claim of USSTC's Breach):

The STMSA creates an obligation on the part of Plaintiffs to cooperate and coordinate and facilitate implementation of the STMSA. (STMSA, §§ VII (a), (a)(4), (f), (c)(6), (m)). Based on a reading of USSTC's Cross-Complaint, it appears USSTC is alleging Plaintiff has violated provisions of the STMSA by not discussing or attempting to resolve this matter in good faith (X-comp. §§44-54), and by improperly speaking on behalf of other States (X-comp. §§ 60-74). USSTC argues its Fourth Affirmative Defense arises from Plaintiff's failure to perform these obligations under the STMSA and Consent Decree. This was not made clear in the Answer. It appears none of the matters giving rise to the affirmative defense are raised by the Complaint, and thus, this is a valid affirmative defense.

Thus, the People's demurrer should be overruled. In the alternative, the demurrer could be sustained with leave to amend to plead ultimate facts regarding the provisions of the STMSA USSTC claims are at issue here.

Fifth Affirmative Defense (USSTC addressed issues, First case People filed against USSTC, USSTC hold its beliefs in good faith):

Again, while not made clear in the Answer, this defense is based on the terms of

Sections VII (c)(5) and (6) of the STMSA. It appears none of the matters giving rise to the affirmative defense are raised by the Complaint, and thus, this is a valid affirmative defense.

Thus, the People's demurrer should be overruled. In the alternative, the demurrer could be sustained with leave to amend to plead ultimate facts regarding the provisions of the STMSA USSTC claims are at issue here.

Sixth Affirmative Defense (Res Judicata, Collateral Estoppel, Mootness):

USSTC has not adequately alleged the defenses of res judicata, collateral estoppel and mootness. USSTC merely alleges in its defense that "Plaintiff's claims are barred in whole or in part by the doctrines of res judicata, collateral estoppel, and/or mootness arising from this Court's entry of the consent Decree and related dismissal. (Ans., p. 14). As pled, this does not meet the requirement of stating ultimate facts. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384).

Thus, the People's demurrer is sustained, with leave to amend.

Seventh Affirmative Defense (Plaintiff's Construction of STMSA and Consent Decree Impermissibly Vague):

USSTC has not adequately alleged its defense that Plaintiff's interpretation of the STMSA and Consent Decree are impermissibly vague. The Seventh Affirmative Defense merely states, "Plaintiff's claims are barred in whole or in part to the extent that plaintiff's claims construe the STMSA and Consent Decree in a manner that would render them impermissibly vague." (Ans., p. 14). This is potentially a valid affirmative defense in that USSTC is arguing that even if the allegations of the Complaint are true, and Plaintiff's interpretation of these allegations are deemed correct, Plaintiff's interpretation still could not constitute a cause of action against USSTC because Plaintiff's interpretation renders the STMSA and Consent Decree impermissibly vague. However, as pled, this defense does not meet the requirement of stating ultimate facts.

Thus, the People's demurrer is sustained, with leave to amend.

Eleventh Affirmative Defense (First Amendment):

The Eleventh Affirmative Defense is valid because Section XIII of the STMSA preserves USSTC's right to raise constitutional challenges to court orders or interpretations thereof that exceed the restrictions, limitations, or obligations of the STMSA.

Section XIII of the STMSA states USSTC waives all claims that the STMSA violates the state or federal constitutions. However, the STMSA qualifies this waiver by stating:

Provided, however, that nothing in the foregoing shall constitute a waiver as to the entry of any court order (or any interpretation thereof) that would operate to limit the exercise of any constitutional right except to the extent of the restrictions, limitations, or obligations expressly agreed to in this Agreement or the Consent Decree. (STMSA, §XIII).

Thus, USSTC waived constitutional defenses only so long as the Court's order is consistent with the "restrictions, limitations or obligations expressly agreed to in this Agreement [STMSA] or the Consent Decree." (STMSA, § XIII). USSTC expressly pled the affirmative defense only "[t]o the extent that plaintiff seeks to impose obligations on USSTC that are not contained in the STMSA." (Ans., p.15, Defs. 11-14).

Thus, the People's demurrer to the Eleventh Affirmative Defense is overruled.

Twelfth Affirmative Defense (Fifth Amendment):

The Twelfth Affirmative Defense is valid because USSTC pled the defense only to the extent Plaintiffs seeks to impose obligations on USSTC that are not contained in the STMSA. (STMSA, §XIII, p. 52). See discussion above.

Thus, the People's demurrer to the Twelfth Affirmative Defense is overruled.

Thirteenth Affirmative Defense (Commerce Clause):

The Thirteenth Affirmative Defense is valid because USSTC pled the defense only to the extent Plaintiffs seeks to impose obligations on USSTC that are not contained in the STMSA. (STMSA, §XIII, p. 52). See discussion above.

Thus, the People's demurrer to the Thirteenth Affirmative Defense is overruled.

Fourteenth Affirmative Defense (Federal Preemption):

The Fourteenth Affirmative Defense is valid because USSTC pled the defense only to the extent Plaintiffs seeks to impose obligations on USSTC that are not contained in the STMSA. (STMSA, §XIII, p. 52). See discussion above.

Thus, the People's demurrer to the Fourteenth Affirmative Defense is overruled.

USSTC's Response to Paragraphs 66-71:

Demurrer is not the proper vehicle to challenge certain paragraphs of an answer that do not make up an entire answer or an affirmative defense. (See CCP §430.50(b)). Thus, Plaintiff's demurrer to USSTC's Response to Paragraphs 66-71 of the Complaint is overruled.

Plaintiff's Motion to Strike USSTC's responses to those paragraphs are denied. A motion to strike can be used to cut out any "irrelevant, false, or improper" matters inserted in the answer. (CCP §436(a)). Plaintiff basis its motion to strike on the basis the response is false. However, Plaintiff does not set forth how they are false. Falsity must appear from the face of the pleadings or from matters judicially noticed. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21). Since the response merely denies the allegations contained in the Complaint at paragraphs 66-71, there is no falsity on the face of the answer. Thus, Plaintiff's Motion to Strike is denied.

IT IS SO ORDERED.